CAUSE NO. 89306-3

SUPREME COURT OF THE STATE OF WASHINGTON

MADERA WEST CONDOMINIUM OWNERS ASS'N, ET AL.

Petitioners,

v.

MARX/OKUBO,

Respondent.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Petitioners, Madera West Condominium Owners Association and individually named plaintiffs (referred to collectively as "the Association") submit the issues raised in Marx/Okubo's ("Okubo") answer to the petition for review should be denied. The Court of Appeal's ("COA") decision to deny Okubo's request for sanctions and attorney fees was the right one.

COUNTER-ASSIGNMENTS OF ERROR[1]

A. There is no conflict between the COA's opinion and the Townsend case. The Association did not exploit Okubo's contract with AF Evans like the plaintiffs exploited their contracts with the developer defendants in Townsend.

B. The COA's decision in not in conflict with the Schaaf case. The Association relied on the reserve study prepared by Okubo, and its negligent misrepresentation claim had a chance of success.

STATEMENT OF THE CASE

Okubo's reserve study expressly said it was prepared for the Association to rely on, to plan, and budget for its reserves. CP 1429; see

[1] Okubo did not assign error to the issues it seeks to have this Court review. To comply with RAP 10.3, the Association is framing its counter-assignment of errors based on argument section of Okubo's response to its petition.

also 1243 at ¶ 4, CP 380 p. 65 ln.s 1-14. The Association used the study to set monthly homeowner dues. Id. at 1566 ¶ 7.

Okubo claims the reserve contribution amounts identified in its study were based on promises by AF Evans to make an initial deposit of $781,000 into the Association's reserve account, and to aggressively maintain the LP siding. Okubo, however, knew the siding at Madera was damaged and in need replacement prior to releasing the study. Id. 1541, 1528. Similarly, Okubo knew the siding had not been aggressively maintained in the past. See id. at 1521, see also 1590-92.

Because Okubo was aware one-third (or more) of the siding was in a state of disrepair in 1996, and as a consequence, aggressive maintenance could not extend the its useful life, and because the Association relied on the 2005 study to set monthly homeowner dues, the Association made a negligent misrepresentation claim against Okubo. Id. at 829-30, 1590-92.

In response to the Association's claim, Okubo sent discovery to, and deposed several homeowners who were individually named as plaintiffs in the action, about whether they "read" reserve study prior to "purchasing" their units.[2] Almost all of the homeowners testified that they relied on the amount of monthly dues communicated to them at the time of purchase as an accurate representation of what they expected to pay to

[2] Madera West Condo Ass'n v. Madera West LLC et al., 68127-3-I at 25.

maintain and make future repairs to Madera. Additionally, many of the homeowners testified that the seller's agent told them at the time of purchase that a portion of their monthly dues would be put into a reserve account. See e.g. id. 1566. Other homeowners explained that they did not "read" the study when they signed their purchase and sale agreement, but reviewed it afterward. Finally, some homeowners testified that they did not understand the interrogatories Okubo sent them, and therefore had to clarify, or redact, all or some portion of certain answers.

ARGUMENT

A. The COA was right. The trial court did not abuse its discretion by denying Okubo's request for attorney fees because the Association did not exploit the Okubo-Evans Contract.

This case is not analogous to Townsend. In Townsend v. Quadrant Corp., 173 Wn.2d 451, 268 P.3d 917 (2012) there were two issues. The first issue was whether plaintiff' claims should be referred to arbitration where the purchase and sale agreements they entered into with defendants (sellers of the property) included a mandatory arbitration clause. The second issue was whether plaintiffs' children, who were also named as plaintiffs in the action, should be referred to arbitration along with their parents even though they did not sign the purchase and sale agreements. Id. at 460. This Court affirmed the decision of the COA to refer the children's claims to arbitration. Id. at 464. It explained, "[a]s general rule

nonsignatories are not bound by arbitration clauses[,]" but there is a limited exception to the rule -- the doctrine of equitable estoppel. Id. at 461 (citing Satomi Owners Ass'n v. Satomi LLC, 167 Wn.2d 781, 810, 225 P.3d 213 (2009). Although plaintiffs' children did not sign the purchase and sale agreements, the complaint failed to separate their claims from their parents' claims. Thus, it appeared plaintiffs were looking to reap the benefit of the promises made by defendants via their children's claims without being compelled to arbitration. Townsend, 173 Wn.2d at 461 (Equitable estoppel precludes a party from seeking all the benefits of a contract but none of its burdens or "knowingly exploiting" a contract.)

Okubo alleges the Association should be equitably estopped like the plaintiffs' in Townsend because it exploited the Okubo – Evans contract. But that is hardly the case. Unlike the plaintiffs in Townsend, the Association's complaint made separate and distinct claims against each of the defendants. Compare CP 829-830 and 825. The Association only asserted two claims against Okubo -- negligence and negligent misrepresentation. The remaining claims, including its breach of contract claim, were directed at other defendants named in the action, not Okubo.

In addition, the Association did not try to enforce any part of the Okubo – Evans contract. The Association maintained all along that it was

not a party to the contract[3], and only sought leave to add Okubo to the action after Affiliated was decided.[4] Id. at 753 at lns. 9-24.

Okubo has no support for its equitable estoppel argument. Okubo filed a motion for summary judgment asserting that it did not owe the Association a duty of care because its contract was with AF Evans. In response, the Association explained: (1) it was not a party to the Okubo – Evans contract; and (2) *assuming* the trial court found the Okubo – Evans had any bearing on the Association's claims against Okubo, Okubo agreed under the terms of its contract with AF Evans, to use the standard of reasonable care applicable to professionals carrying out similar same services.[5] CP 766 lns. 6-10, 13. The Association did not therefore bring the Okubo – Evans contract into dispute. It was Okubo that injected the contract into case to pursue its attorney fee argument. The Association was merely responding to an argument raised in Okubo's motion for summary judgment, which is not an exploitation of the Okubo – Evans contract by any stretch of the imagination.

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[3] The Association is not a "client" or "party" to the Okubo – Evans contract. See generally CP 766-768

[4] Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc., 170 Wash.2d 442, 243 P.3d 521 (2010) (architects and engineers owe a duty of care to third-party's even in the absence of contractual privity).

[5] The attorney fee clause only awarded fees in arbitration.

Finally, Townsend was about compelling arbitration, not awarding attorney fees; two entirely separate paradigms. Washington as a matter of policy favors arbitration, whereas it does not have a policy that begins in favor of awarding attorney fees. Compare Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc., 148 Wn.App. 400, 403–04, 200 P.3d 254 (2009); Rettkowski v. Dep't of Ecology, 128 Wn.2d 508, 514, 910 P.2d 462 (1996).

B. Okubo is not entitled to CR 11 sanctions because the Association had a chance to prevail on its negligent misrepresentation claims.

Okubo challenges the trial court and COA's discretion to not sanction the Association under CR 11 by arguing its decision is in conflict with Schaaf v. Highfield, 127 Wn.2d 17, 896 P.2d 665 (1995). Before distinguishing Schaaf, the COA explained a trial court does not abuse its discretion in denying a request for CR 11 sanctions if a claim has a chance of success. Skimming v. Boxer, 119 Wn. App. 748, 755, 82 P.3d 707 (2004) ("The trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success.")[6] Here, the Association's negligent misrepresentation claim did have a chance of success. Madera West Condo Ass'n, 68127-3-I at 26.

[6] Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992) (The court should not consider what was expected using the wisdom of hindsight and should test the signer's conduct based on what was reasonable at the time the pleading was submitted).

The COA did not err in distinguishing Schaaf from this case. In Schaaf, plaintiff, John Schaaf, brought a claim against a third-party home appraiser for his failure to disclose problems with the roof on a home he planned to purchase. This Court held Mr. Schaaf's negligent misrepresentation claim was rightfully dismissed. It reasoned Mr. Schaaf failed to show that he relied on the home appraiser's report "at all" prior to purchasing his home. Id. at 30. Mr. Schaaf knew the home needed a new roof before the appraisal was done, and the first time he ever reviewed the home appraiser's report was a year after the purchase.

In this instance, the Association "relied" on Okubo's reserve study.[7] Although each homeowner may not have "read" the report prior to the "purchase"[8], the information in the study was communicated to them during the sales process by the seller's agent, and before they signed their sales agreements.[9]

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[7] The COA correctly noted that Okubo's discovery focused on whether the homeowners "read" the complaint versus whether they "relied" on the information in the study in making their decision to purchase. Madera West Condo Ass'n, 68127-3-I at 25.

[8] Ownership of a condominium does vest until a deed is transferred. RCW 64.34.020 (13). Okubo was asking the owners to separate things in written discovery and deposition. The discovery asked if owners read the study prior to taking an "ownership interest". At deposition, the question was did you read the study prior to "purchasing". Madera West Condo Ass'n, 68127-3-I at 29.

[9] It is not necessary for a purchaser to review the Public Offering Statement prior to purchase. RCW 64.34.420 allows a condominium purchaser seven days to review a Public Offering Statement and cancel a purchase and sale agreement.

Okubo's request for sanctions arises out of its own characterization of the Association's negligent misrepresentation claim. Its questions were, moreover, targeted at eliciting the answers it wanted to hear. The Association's claim was not simply: the reserve study is inaccurate / inadequate. As the Association explained to Okubo prior to filing its third amended complaint, its negligent misrepresentation claim was a product of Okubo's failure to identify reasonable reserve contributions, which in turn caused the Association to set monthly dues far below the amount necessary to make repairs. CP 813. All of the homeowners who were asked about their monthly dues testified they relied on the amount communicated to them at the time of purchase, and the Association testified that it set monthly dues based on Okubo's study. CP 1566.

Finally, several owners testified they would not have purchased their units if they knew prior to, that their monthly dues would be three times the amount listed in the Public Offering Statement, which is the amount the Association would need to collect to have enough money to make necessary repairs to their homes. Id.

CONCLUSION

The Association did not "knowingly exploit" the Okubo – Evans contract, nor were the Association's tort claims dependent on the Okubo – Evans contract. Okubo's request for fees was therefore properly

denied.

Okubo's request for sanctions was also properly denied. This Court need not review Okubo's request for sanctions when the request itself is based on a mischaracterization of the Association's negligent misrepresentation claim, and the claim, even as posited by Okubo, had a chance of success.

RESPECTFULLY SUBMITTED this 22nd day of October.

/s/
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Dear Sir/Madam,

Attached is petitioners' reply in support of their petition for review in the matter of Madera West Cond Owners Ass'n v. Marx/Okubo, No 89306-3. Counsel has agreed to accept service electronically, and is therefore copied hereto.

Regards,
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